

No. 92-1856

Supreme Court, U.S.  
**FILED**

**NOV 16 1993**

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

CITY OF LADUE, *et al.*,

*Petitioners,*

v.

MARGARET P. GILLES,

*Respondent.*

On Writ of Certiorari To  
The United States Court of Appeals  
For the Eighth Circuit

BRIEF OF THE STATES OF HAWAII, INDIANA,  
MARYLAND, NEW HAMPSHIRE, NEW JERSEY,  
PENNSYLVANIA AND VERMONT AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

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## **QUESTIONS PRESENTED**

1. Whether the court of appeals erroneously held that the Ladue sign ordinance is content-based in violation of the First Amendment because it allows limited exceptions to its general prohibition of all signs even though the ordinance has a content-neutral purpose to prohibit the proliferation of signs which cause visual blight, create safety hazards and diminish the value of real estate.

2. Whether the court of appeals erroneously held that the limited exceptions in the Ladue sign ordinance favor commercial speech over noncommercial speech rendering the ordinance unconstitutional.

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**BRIEF OF THE AMICI CURIAE STATES  
IN SUPPORT OF PETITIONERS**

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Pursuant to Sup. Ct. R. 37, the signatory States  
respectfully submit this brief as amici curiae in support  
of Petitioners.

## **INTEREST OF THE AMICI CURIAE**

This case involves government's ability to manage effectively the control of signs for purposes of protecting the traveling public and minimizing visual blight caused by the proliferation of signs. The Eighth Circuit's decision severely restricts that ability and precludes government efforts to effectively regulate signs absent a total ban of all signs -- an entirely impractical and unworkable solution. Moreover, the Eighth Circuit analysis calls into question the constitutionality of the states' existing laws prohibiting outdoor signs along federal-aid primary highways pursuant to the Highway Beautification Act, 23 U.S.C. §131 *et seq.*, thus jeopardizing the public investment in those highways and their continued safety, recreational value and surrounding natural beauty.

These consequences will be doubly burdensome in that states face a ten percent reduction of federal highway funds for any failure to effectively control the erection and maintenance of outdoor advertising signs, displays and devices in designated areas. Any reduction in federal funding will have particularly harsh effects in today's economic environment in which the states' highways and transportation infrastructure require increased, not decreased, expenditures for purposes of maintenance and repair.

## **ARGUMENT**

### **I. THE EIGHTH CIRCUIT'S DECISION THREATENS STATE HIGHWAY BEAUTIFICATION LAWS.**

The issue in this case is whether the Ladue sign ordinance is subject to strict scrutiny as a content-based

regulation because it allows limited exceptions to its general prohibition on noncommercial and commercial signs, even though the legislative purpose for the exceptions is content-neutral and the excepted signs are limited to those conveying information related to traffic safety, real estate for sale or lease, and on-site identification information.

The Eighth Circuit held that the Ladue ordinance is content-based because it favors commercial speech over noncommercial speech and favors certain types of noncommercial speech over others. The Eighth Circuit further held that, under the secondary effects doctrine, the Ladue ordinance violates the First Amendment because Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than do the

permitted signs, and because it has "singled out" certain categories of signs for discriminatory treatment.

The "all or nothing" approach of the Eighth Circuit severely impairs the states' ability to control the proliferation of signs without banning all signs and calls into question the constitutionality of numerous State laws regulating the proliferation of signs along federal-aid primary highways in compliance with the HBA. Unless this Court reverses that decision and clarifies the law in this area, states will be greatly hampered in their ability to protect the safety, recreational value and surrounding scenic beauty of their highways, and state reliance on federal highway funds contingent on the enactment and enforcement of such protections will be jeopardized.

**A. Federal Provisions for  
Highway Beautification.**

The States have a long-standing commitment to the enhancement of the scenic character of the nation's major highways, by limiting billboards and other visual eyesores. After the enactment of the Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89 (1958), states entered into agreements with federal agencies for state regulation of billboards adjacent to Interstate highways to control the erection and maintenance of signs in accordance with the criteria contained in the Act and governing regulations. The stated purpose of the Act was to

promote the safety, convenience, and enjoyment of public travel \* \* \* [and] to control the use of and to improve areas adjacent to the Interstate System by controlling the erection and maintenance of outdoor advertising signs, displays,

and devices adjacent to that system.

72 Stat. at 95.<sup>1</sup> States, such as Maryland, that entered such agreements, and controlled signs in accordance with the applicable criteria, were entitled to "bonus" payments of additional federal highway aid. This program is still in effect today. See 23 U.S.C. §131(j); 23 C.F.R. §§750.101 - 750.110.

The states strengthened their commitment to controlling billboards after the passage of the Highway Beautification Act (HBA), Pub. L. No. 89-285, 79 Stat. 1028 (1965). That Act was designed "to protect the public investment in \* \* \* highways, and to promote the safety and recreational value of public highways, and to preserve natural beauty." 23 U.S.C.

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<sup>1</sup> The Interstate system is a limited network of highways linking major metropolitan areas and industrial centers. See 23 U.S.C. §103(e).

§131(a). Under the Act, on penalty of a ten (10%) percent reduction of federal highway funds, states provide for the "effective control of the erection and maintenance \* \* \* of out-door advertising signs, displays, and devices" in designated areas within specified distances of Interstate highways or of highways designated as part of the state's "primary system."<sup>2</sup> 23 U.S.C. §131(b). All 50 states have

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<sup>2</sup> The "primary system," which refers to "federal-aid primary system," consists of a limited percentage of major state highways, which are not part of the Interstate system but which receive federal highway aid. See 23 U.S.C. §103(b)(1) (1988). Recently, that designation has been superseded by the Intermodal Surface Transportation Efficiency Act of 1991, which calls for the creation of a National Highway System by 1995. See Pub. L. No. 102-240, §1006, 105 Stat. 1923-27 (1991). Congress simultaneously amended the HBA to define "primary system" as "the Federal-aid primary system in existence on June 1, 1991, and any highway which is not on such system but which is on the National Highway System." 23 U.S.C. §131(t).

adopted programs controlling outdoor signs<sup>3</sup> in order to comply with the HBA.<sup>4</sup>

The HBA defines "effective control" in terms of the types of signs to be permitted within the protected areas. 23 U.S.C. §131(c). Signs within the designated areas are generally prohibited with a few exceptions such as (1) "directional and official signs," including but not limited to those pertaining to natural wonders, scenic and historical attractions; (2) signs "advertising the sale or lease of property upon which they are located"; (3) signs "advertising activities

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<sup>3</sup> A complete listing of all 50 state laws appears in the West's annotated codes for each state's law pursuant to the HBA. See, for example, Cal. Business and Professions Code Ann., §5200 (1993 Supp.).

<sup>4</sup> State compliance with the Act, including the effectiveness of their control programs, is monitored by the Federal Highway Administration, United States Department of Transportation, pursuant to comprehensive regulations set forth at 23 C.F.R. Part 750.

conducted on the property on which they are located"; (4) "landmark signs"; and (5) signs "advertising the distribution by nonprofit organizations of free coffee." 23 U.S.C. §131(c). The Act also provides for further exceptions in commercial and industrial areas. 23 U.S.C. §131(d).

#### **B. The Maryland Statute**

As have all other states, Maryland has enacted legislation to regulate billboards pursuant to the HBA. See Md. Transp. Code Ann., §8-725 *et seq.*<sup>5</sup> Like the

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<sup>5</sup> Md. Transp. Code Ann., Subtitle 7 provides for the "Regulation of Outdoor Advertising." This subtitle is divided into six subparts. Part I. "Definitions; General Provisions;" Part II. "Licensing of Outdoor Advertising Business;" Part III. "Outdoor Signs Along State Highways Generally;" Part IV. "Outdoor Signs Along Federal-Aid Primary Highways;" Part V. "Outdoor Signs Along Expressways;" and Part VI. "Enforcement and Penalties." In this brief, we focus on those provisions of the Maryland law set forth in Part IV that deal with the placement of signs along highways covered by the HBA, and that were enacted specifically to comply with the HBA.

majority of state statutes, the Maryland statute provides that "except for on premise advertising, outdoor advertising along and adjacent to the federal-aid-primary system of highways is a commercial use of these highways that should be regulated to: (1) prevent unreasonable distraction of the drivers of motor vehicles"; (2) "prevent confusion ... and interference with the effectiveness of traffic regulations"; (3) "promote the prosperity, economic well-being, health, safety, morals, order, convenience, and general welfare"; (4) "promote the enjoyment of travel ... and protect[] ... the public investment in highways"; and (5) "preserve and enhance the natural scenic beauty or esthetic features and values of these highways and their adjacent areas." Md. Transp. Code Ann., §8-726(a). The Maryland statute, like most state statutes, further

adopts the public policy reasons declared by the Congress in the HBA. The statute applies to signs along or near a federal-aid primary highway if "the sign is wholly or partly visible from the main traveled way" and is "660 feet or less from the nearest edge of the right-of-way or more than 660 feet and intended to be read from the main traveled way." Md. Transp. Code Ann., §8-727(a). It does not apply to "on premise outdoor signs."<sup>6</sup> Md. Transp. Code Ann.,

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<sup>6</sup> "On premise outdoor signs" is defined to mean any outdoor sign that, regardless of content, is designed, intended or used to advertise or inform the traveling public of: (1) the sale or lease of the property on which its is located; (2) the sale or lease of a product grown, produced, or manufactured on the property on which it is located; or (3) the name of the owner, agent, assignee, or lessee of the property on which it is located. "Outdoor sign" means any "outdoor sign, ... billboard, device, or other thing that is designed, intended, or used to advertise or inform the traveling public." Md. Transp. Code Ann., §8-701(d) and (e). In addition, official and "on premise" signs, as defined in 23 U.S.C. §131(c) of the HBA are exempt. See §8-732(e)(4).

§8-727(c). Again, like most other state statutes, the Maryland statute generally prohibits private property owners from allowing others to use their property to erect or maintain signs unless the sign is in "a commercial or industrial area" or the sign is "in an urban area and more than 660 feet from the nearest edge of the right-of-way of the highway." Md. Transp. Code Ann., §8-728.

Like the Ladue ordinance, the Maryland highway beautification statute distinguishes between certain categories of signs, exempting from the general prohibition "on premise outdoor signs," including real estate for sale or lease signs relating to the property, signs identifying the owner, agent, assignee or lessee of the property, directional and official signs relating to natural wonders, scenic and historical attractions,

landmarks and signs advertising activities conducted on the property. Under the reasoning of the Eighth Circuit, such exemptions may be deemed content-based, subjecting the Maryland statute, and similar HBA statutes in other states, to strict scrutiny. This Court should reverse the decision below and remove the impediments it poses to the states' ability to erect effective and practical controls on the proliferation of signs pursuant to the HBA.

**II. AN OTHERWISE CONTENT-NEUTRAL SIGN ORDINANCE IS NOT A CONTENT-BASED RESTRICTION, AND THEREFORE SUBJECT TO STRICT SCRUTINY, MERELY BECAUSE IT GRANTS EXCEPTIONS FOR SIGNS THAT CANNOT SUFFICIENTLY CONVEY THEIR MESSAGE BY ANY ALTERNATIVE MEDIA.**

**A. Signs Are Subject To Reasonable Time, Place and Manner Restrictions So Long As The Restrictions Are Content-Neutral.**

Signs have a primary effect as a means of communication or "speech" entitling them to First Amendment protection. See Metromedia, Inc., v. City of San Diego, 453 U.S. 490, 501-02 (1981)(plurality opinion). They also have substantial secondary or non-communicative aspects that are the legitimate subject of land-use, traffic safety and aesthetic concern. Id. at

501-02, 509. Since signs visible to motorists attract their attention, the proliferation of such signs poses a risk to traffic safety. *Id.* at 509.<sup>7</sup> "Similarly, billboards, by their very nature, wherever located and however constructed, can be perceived as an esthetic harm."<sup>8</sup> *Id.* at 510. The dual concerns of traffic

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<sup>7</sup> In *Metromedia, supra*, this Court declined "to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509.

<sup>8</sup> It is well settled that a state may legitimately exercise its police powers to advance aesthetic values. *E.g., Members of City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. at 33. See also *Penn Central Transportation Co. v. The City of New York*, 438 U.S. 104, 129 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926); *Welch v. Swasey*, 214 U.S. 91, 108 (1909).

safety and the preservation of natural beauty underlie both the Ladue ordinance in question as well as states' efforts to limit signs along primary highways in accordance with the HBA.

This Court has long recognized that legitimate government interests in regulating the noncommunicative aspects of speech can justify regulations that may have a significant impact on its communicative aspects as well. *E.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)(sleeping in public park to communicate views regarding homeless interferes with general use of park); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)(adult theatres cause economic and aesthetic blight). The traditional test for evaluating whether such content-neutral government regulations

violate the First Amendment is the "time, place, manner" test. E.g., Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456, 2461 (1991); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981); see United States v. O'Brien, 391 U.S. 367 (1968).

The Court summarized the three-part "time, place, manner" test used to evaluate such regulations as follows:

Our cases make clear \* \* \* that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

Time, place and manner restrictions have been found appropriate regarding such quality of life issues as "loud and raucous sound trucks," Kovacs v. Cooper, 336 U.S. 77 (1949), signs posted on public property, Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 446 U.S. 789, 806 (1984), and the loud amplification of music

intruding into residential areas, Ward v. Rock Against Racism, 491 U.S. 781 (1989).

The Eighth Circuit rejected application of a "time, place, manner" test to the Ladue ordinance in question and subjected it instead to strict scrutiny as a "content-based" restriction. The circuit court reached this result because, in the court's view, the ordinance distinguished between commercial and noncommercial speech and favored certain types of noncommercial speech over others.

This reading of the ordinance was in error, and the conclusion that the ordinance's limited exceptions were content-based was plainly wrong. The Ladue ordinance, like state laws on highway beautification, prohibits all signs regardless of content-based distinctions, with limited exceptions for signs

conveying messages relating to traffic safety, official information, real estate for sale or rent signs and onsite identification information.<sup>9</sup> These exceptions, properly understood, are not a consequence of Ladue's desire to look favorably on the content of certain

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<sup>9</sup> The permitted signs in the Ladue ordinance include municipal signs, subdivision and residence identification signs, road signs and driveways signs, health inspection signs, signs for churches, religious institutions and schools, identification signs for not-for-profit organizations, signs identifying the location of public transportation stops, signs advertising the sale or rental of real property and "commercial" signs in commercially zoned or industrial zoned districts.

The Ladue ordinance's use of the word "commercial" may have led to its being misconstrued by the Eighth Circuit to contain content-based distinctions between commercial and non-commercial signs in commercial and industrial areas. Upon careful examination of Sections 35-6, 35-7, 35-8, and 35-9, however, it is apparent that in commercial and industrial areas, the Ladue ordinance merely excepts signs that identify or advertise the businesses, products, services or activities to be found at each location. For these unique messages bearing a connection to that location, there exist no adequate alternative media.

commercial or noncommercial messages. Rather, these exceptions were carved out in the Ladue ordinance, as in the state highway beautification laws, to permit signs which send messages, regardless of their content, that cannot be sufficiently expressed via any alternative media. For example, such exceptions permit passersby with no access to other modes of communication to identify that which they are looking for, i.e., residences, businesses, churches and schools, as well as traffic safety information. As discussed in Part C, infra, such ordinances should not be deemed content-based on these grounds alone.

In holding that the ordinance constitutes a "content-based" regulation, the Eighth Circuit wrongly focused on perceived distinctions between commercial and noncommercial signs, citing Metromedia, Inc. v.

City of San Diego, 453 U.S. 490 (1981).<sup>10</sup> This perception fails to discern the actual nature of the exceptions carved out by the Ladue ordinance, and improperly characterizes them as distinguishing between types of commercial and noncommercial speech entitled to protection rather than as exceptions for on-site messages for which there are no adequate alternative modes of expression.

Both Justice Brennan and Chief Justice Burger warned, in Metromedia, of the dangers of unduly emphasizing distinctions between commercial and noncommercial speech when approaching the issues

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<sup>10</sup> In Metromedia, no constitutional theory was able to command a majority, and one Justice referred to the resulting opinions as "a virtual Tower of Babel." Id. at 569 (Rehnquist, J., dissenting). In the absence of a single opinion stating the "narrowest ground" for decision, the basis for the Eighth Circuit's reliance on Metromedia is unclear.

raised by sign restrictions. See Metromedia, 453 U.S. at 538-40 (Brennan, J., concurring); id. at 564-67 (Burger, C.J., dissenting). Supreme Court cases "recognize the difficulty in making a determination that speech is either "commercial" or "noncommercial." Id. at 539 (Brennan, J., concurring). Indeed, any analysis based on a conclusion that the Constitution requires preferential treatment for noncommercial speech is clearly incorrect in light of this Court's ruling in City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505, 1511 (1993)(overturning ordinance banning newsracks distributing commercial publications while exempting newsracks distributing noncommercial publications, stating such an ordinance "attaches more importance to the distinction between commercial and noncommercial speech than our cases

warrant and seriously underestimates the value of commercial speech").

**B. A Sign Ordinance Is Content-Neutral Provided It Is Justified Without Reference to the Content of the Regulated Speech.**

An ordinance is "content-neutral" as long as it is "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. at 791. A government may regulate the "time, place, or manner" of speech as long as the regulation is not "'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538, 2547 (1992), quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 555 (1981)(Stevens J., dissenting in part). A government may "not regulate

use based on hostility -- or favoritism -- towards the underlying message expressed." R.A.V., 112 S.Ct. at 2545. Compare Frisby v. Schultz, 487 U.S. 474 (1988)(upholding content-neutral ban on targeted residential picketing) with Carey v. Brown, 447 U.S. 455 (1980)(invalidating a ban on residential picketing that exempted labor picketing). The Ladue ordinance should be deemed content-neutral because its purpose is to control the secondary effects of speech, not to control the message or content of the signs permitted by the exceptions.

Emphasizing the relevant consideration to be the intent of the regulation, this Court has emphasized that the First Amendment imposes not an "underinclusiveness" limitation, as impliedly imposed by the Eighth Circuit, "but a 'content discrimination'

limitation upon a State's prohibition of proscribable speech." R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538, 2545 (1992). "The validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." Ward v. Rock Against Racism, 491 U.S. at 801. So long as there is a reasonable relationship between the regulation and its goals, courts should defer to a government's reasonable judgment as to the best way of addressing the problems it faces. Ward v. Rock Against Racism, 491 U.S. at 800. Thus, a regulation is valid provided the government could reasonably have determined that its interests overall would be served less effectively without the regulation than with it. Ward, 491 U.S. at

801; United States v. Albertini, 472 U.S. 675, 688-89 (1985); Clark v. Community for Creative Non-Violence, 468 U.S. at 296-97.

Ladue's sign ordinance satisfies these requirements because its purpose is to prevent visual blight and other evils caused by a proliferation of signs, regardless of the ideas expressed. As this Court recognized in Vincent, "the substantive evil -- visual blight -- is not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. at 810. The Ladue sign ordinance, like the state highway beautification laws, is precisely the type of content-neutral regulation permitted by R.A.V., Ward, and Vincent. Based on Vincent, it was "reasonable" for Ladue to enact its sign ordinance to prevent sign proliferation and visual blight in its

community. That Ladue is "underinclusive" or does not ban all signs, is not the criterion on which to judge whether the ordinance discriminates on the basis of content. Instead, this Court should look to the content-neutral purpose to ban the proliferation of signs and promote safety, and determine that Ladue could reasonably have determined that its interests would be served less effectively without the ordinance than with it.

**C. Exceptions for On-Site Signs That Cannot Convey Their Message Via Any Sufficient Alternative Medium Do Not Render a Regulation Content-Based.**

The Ladue ordinance should be read, with its content-neutral purpose in mind, to ban all signs regardless of content except those onsite signs which

constitute a unique mode of expression in that they provide safety and traffic information as well as other identifying information relating to locating a residence, business, school, religious or non-profit organization, historic site or activities, products, or services available at the location.<sup>11</sup> Such information, because

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<sup>11</sup> The majority of Justices on the Metromedia Court (Chief Justice Burger and Justices Brennan, Blackmun, Rehnquist and Stevens) agreed that limited exceptions to a general ban on signs, such as those in the Ladue ordinance, do not alone render an ordinance unconstitutional, finding that the limited exceptions to Metromedia's general ban were too insignificant to rise to the level of content-based discrimination. Metromedia, 453 U.S. at 526 (Brennan, J., concurring, with whom Blackmun, J. joins); id. at 553-55 (Stevens, J., dissenting in part); id. at 564, 566 (Burger, J., dissenting); id. at 570 (Rehnquist, J., dissenting). The excepted categories in Metromedia included government signs; signs at public bus stops; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs. 453 U.S. at 494-95. See also Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 98 (1972)("[T]here may

of its relationship to the specific property and its use, cannot be sufficiently conveyed by any alternative medium of expression other than a sign located on the premises. The Ladue ordinance at issue recognizes that such signs, a specific type of "onsite" or "on-premises" signs, because of their unique capability to reach their intended audience, must be accorded special treatment.<sup>12</sup>

Many courts have upheld similar onsite/offsite sign distinctions as content-neutral restrictions based on an appropriate regulation of the "place" or location of

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be sufficient regulatory interests justifying selective exclusions or distinctions....").

<sup>12</sup> The terms "onsite" and "offsite" do not actually appear in the Ladue ordinance. These terms, however, best convey the general character of the distinctions made in the Ladue ordinance.

speech.<sup>13</sup> Others, like the Eighth Circuit, have held

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<sup>13</sup> See Wheeler v. Commissioner of Highways, 822 F.2d 586, 589-94 (6th Cir. 1987), cert. denied, 484 U.S. 1007 (1988); Messer v. City of Douglasville, 975 F.2d 1505, 1507-11 (11th Cir. 1992); Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43, 45 (4th Cir. 1987); Rzadkowsky v. Village of Lake Orion, 845 F.2d 653, 654-55 (6th Cir. 1988); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987); National Advertising Co. v. City of Chicago, 788 F. Supp 994, 997-98 (N.D. Ill. 1991); Burns v. Barrett, 561 A.2d 1378, 1384-85 (Conn.), cert. denied, 493 U.S. 1003 (1989); National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300, 1305-08 (Ill. App. 1990), appeal denied, 567 N.E.2d 333 (Ill.), cert. denied, 111 S.Ct. 2917 (1991); Pigg v. State Dept of Highways, 746 P.2d 961, 963-68 (Colo. 1987); Barber v. Municipality of Anchorage, 776 P.2d 1035, 1037 (Alaska), cert. denied, 493 U.S. 922 (1989); Carroll Sign Co., Inc. v. Adams County, 606 A.2d 1250, 1254-55 (Pa. Commw. 1992); City of Lake Wales v. Lamar Advertising Ass'n, 414 So.2d 1030, 1031 (Fla. 1982); State by Spannaus v. Hopf, 323 N.W.2d 746, 753-55 (Minn. 1982); Donrey Communications Co. v. City of Fayetteville, 660 S.W.2d 900, 902 (Ark. 1983), cert. denied, 466 U.S. 959 (1984); see also Chicago Observer, Inc. v. City of Chicago, 929 F.2d 325, 328 (7th Cir. 1991)(off-premises advertisements on newsracks).

Several pre-Metromedia decisions also upheld onsite/offsite distinctions. See United Advertising Corp. v.

that exceptions for onsite signs are unlawful content-based distinctions, at least in the absence of preferential treatment of noncommercial messages.<sup>14</sup> More careful scrutiny of the pertinent statutory provisions of the Ladue ordinance reveal, however, that the exceptions are in fact entirely content-neutral

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Borough of Raritan, 93 A.2d 362, 365 (N.J. 1952); United Advertising Corp. v. Borough of Metuchen, 198 A.2d 447, 450 (N.J. 1964); State v. Lotze, 593 P.2d 811, 814-15 (Wash.), app. dismissed, 444 U.S. 921 (1979); Suffolk Outdoor Advertising Co., Inc. v. Hulse, 373 N.E.2d 263, 265 (N.Y. 1977), appeal dismissed, 439 U.S. 808 (1978); Donnelly Advertising Corp. v. Mayor of Baltimore, 370 A.2d 1127, 1132-33 (Md. 1977).

<sup>14</sup> See National Advertising Co. v. Town of Niagara, 942 F.2d 145, 147 (2d Cir. 1991); Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 516-17 (1st Cir. 1989); National Advertising Co. v. Town of Babylon, 900 F.2d 551, 556-57 (2d Cir.), cert. denied, 498 U.S. 852 (1990); Metromedia, Inc. v. Mayor & City Council of Baltimore, 538 F. Supp. 1183, 1187 (D. Md. 1982); Fisher v. City of Charleston, 425 S.E.2d 194, 196-99 (W.Va. 1992); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 433 N.E.2d 198, 200-01 (Ohio 1982).

and should be viewed not as preferring commercial messages over noncommercial messages or some types of noncommercial messages over others, but as excepting only messages uniquely limited to the location and for which there is no sufficient alternative mode of communication other than an onsite sign.

To qualify as an "on-site" sign under this definition, the content of the sign must bear a relationship to the particular location and its use. However, this quality of a connection with the site is not the type of content-based distinction or government favoring of a particular viewpoint which the First Amendment prohibits. Courts have recognized that exceptions for onsite signs are not content-based solely "because the determination of whether a particular sign is allowed at a given location is a function of the

message on the sign itself." National Advertising Co. v. Downers Grove, 561 N.E. 2d 1300, 1307 (Ill. App. 1990), quoting, Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (1987), cert. denied, 484 U.S. 1007 (1988); State by Spannaus v. Hopf, 323 N.W.2d 746, 753-54 (Minn. 1982). See also Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1447-48 (N.D. Ill. 1990). In Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), for example, this Court upheld a state fair rule restricting certain types of speech to fixed locations (i.e., fair booths) that had to be rented. In practice, that rule operated as a general ban with an onsite sign exception: the permitted speech was limited to rented locations, and any group wishing to engage in such speech was required to acquire a site at which to do

so. The Court recognized that such a regulation was content-neutral because it discriminated against no viewpoint or subject but merely regulated the location of various activities in an evenhanded manner. *Id.* at 648-49.

The essential neutrality of an "onsite" exception such as that found in the Ladue ordinance is apparent when one considers the "unique nature" of onsite signs. See State by Spannaus v. Hopf, 323 N.W.2d 746, 753 (Minn. 1982). As Justice Brennan wrote in 1952, for the New Jersey Supreme Court, such signs are "in actuality a part of the business itself, just as the structure housing the business is a part of it ..." United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 365 (N.J. 1952). This Court has recognized that onsite signs may serve uniquely

important functions to property owners. See Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977)(for sale signs for residential homes). Indeed, this Court has long upheld enactments permitting advertisements in a particular location, when they bear a connection to a location or vehicle, but not permitting general purpose advertising. See Packer Corp. v. Utah, 285 U.S. 105, 107 (1932)(rejecting equal protection challenge to ban on cigarette billboards, excepting *inter alia* the premises of any dealer in such products); Railway Express Agency, Inc., v. New York, 336 U.S. 106, 109-10 (1949)(upholding ordinance banning advertisements on vehicles, except for those relating to a business in which the vehicle is engaged).

Regardless of content, an onsite sign such as

that excepted by the Ladue ordinance serves to convey a message uniquely tied to that location and its use, and which cannot be conveyed through any alternative medium. Short of permitting exceptions for such signs, it is difficult to visualize how the particular message could be conveyed to those deemed most important to be reached, i.e., those in the immediate vicinity of the property. A total prohibition on such signs may actually violate the First Amendment by denying the only effective channel of communication to one trying to identify a message linked to specific property and its use. "[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." Vincent, 466 U.S. at 812 (citations omitted). See Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977).

In contrast, offsite signs -- signs not inherently linked to their site and its use -- may be a significant medium of communication, but they are only one of numerous media that are available to convey the messages they contain. Offsite signs, including "noncommercial" or political ones, such as in this case, are not linked with a specific property site in order to derive their meaning. Therefore, preventing the erection of an offsite sign in a particular location does nothing to suppress a particular message. If a speaker's goal is to deliver a message such as "this is the Miller home," "we sell toys here," or "this property is for sale or rent," there is virtually no other manner to deliver this same message effectively other than by means of an onsite sign. See State v. Lotze, 593 P.2d 811, 814 (Wash.), appeal dismissed, 444

U.S. 921 (1979). On the other hand, any message that can be placed on an offsite sign -- such as "Say No to War in the Persian Gulf, Call Congress Now," as in this case, or "Vote for John Smith," "Buy Millie's Millinery," or "Support Gun Control" -- can be delivered by other alternative means or media.

The distinction drawn by the Ladue ordinance, between messages that must be delivered onsite to be meaningful and offsite messages that can be meaningfully delivered in a myriad of other ways, directly serves the government purpose in restricting the proliferation of signs, because such onsite signs are self-limiting -- by definition, each is confined to a specific location. Conversely, offsite signs -- signs not integrally linked to the property and its use -- are inherently more prone to proliferation. Accordingly,

an otherwise neutral distinction between onsite and offsite signs is well-tailored to combatting the proliferation of signs, which is the stated intent behind the Ladue ordinance.

The Ladue ordinance is a valid time, place and manner restriction in that it is narrowly tailored to suit its intended purposes and leaves open alternative channels of communication for the prohibited speech -- off-site signs. See L. Tribe, American Constitutional Law, §12-23 at p. 982 (2d ed. 1988) (content-neutral restriction is insubstantial and should be upheld if the claimant has the ability to reach the same audience with the same message using alternative channels of communication). The prohibition of off-site signs does not bar the message from reaching its intended audience through other channels of communication.

The same is not true of a ban of onsite signs that the Ladue ordinance and the various highway beautification laws except, *i.e.*, those that identify a person or organization's location or the product or service provided therein, official signs, traffic safety signs, historic or landmark signs.

In other words, offsite signs constitute a particular mode or manner of speech. As such, governments may single them out for restriction as a mode or manner of speech that interferes with the substantial government interest in preventing the visual blight and safety hazards caused by a proliferation of signs. See Metromedia, 453 U.S. at 525-26 (Brennan, J., concurring opinion); *id.* at 545 (Stevens, J., dissenting in part). No Justice in Metromedia disputed that neutral restrictions limited to offsite signs should

be upheld. A distinction between on-site and off-site messages as defined herein simply favors those messages for which there are not sufficient alternative means for expression.

Even if one views the Ladue ordinance as making distinctions between commercial and noncommercial speech and imposing more stringent restrictions on the latter, as the Eighth Circuit erroneously does, the Ladue ordinance should be upheld because government cannot prevent the proliferation of signs if all noncommercial speech is immune from regulation. The effect of such a rule would be to encourage the proliferation of noncommercial signs, which could, at the very least, be placed at any site which might qualify for a sign at all. With such a porous standard, government could

be effectively deprived of the ability to produce any real benefit in terms of reducing the overall number of signs. On the other hand, a ban of all signs significantly interferes with government's ability to ensure the conveyance of on-site identifying and roadside safety information. Thus, application of either extreme of the Eighth Circuit's draconian approach jeopardizes the government's exercise of its general police powers and ability to ensure traffic safety and general order.

## **CONCLUSION**

For the reasons stated, this Court should reverse the decision of the United States Court of Appeals for the Eighth Circuit.

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